its threat. The point of *Sankyo* here is that the court recognized that the correct standard for the justiciability is the injury-traceability-redressability test on which Teva relies, and not the Federal Circuit's "reasonable apprehension of imminent litigation" test.

Finally, Pfizer can read *Societe de Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938 (9th Cir. 1981), as consistent with the Federal Circuit's ruling only by ignoring what the Ninth Circuit actually said. That court recognized the important role that declaratory judgment actions play in giving competitors recourse against "scarecrow" patents by providing an opportunity for competitors to obtain a definitive ruling concerning a patent that the patentee chooses not to jeopardize by bringing an infringement suit. *Id.* at 943. While recognizing that an outright threat of infringement litigation — the court said nothing about *imminent* litigation — was sufficient to establish a justiciable case or controversy, the court went on to "conclude that the Constitution has a much lower threshold than this standard would suggest," namely a "real and reasonable apprehension that [the plaintiff] will be subject to liability." *Id.* at 944. This apprehension of liability standard properly focuses less on whether the defendant has rattled its litigation sabers and more on whether the plaintiff has embarked on a course of conduct that would reasonably expose it to liability if the conduct persists. *Id.* This is inconsistent with a requirement of reasonable apprehension that the defendant will commence infringement litigation imminently.

Pfizer suggests that the apprehension of "liability" instead of "litigation" is only a "slight verbal variance [with] no analytical significance." But the policy of providing recourse against "scarecrow" patents that bring about an

anticompetitive effect by virtue of *not* being asserted in litigation makes the distinction both important and clear. One of the principal purposes of the Declaratory Judgment Act was to allow competitors to obtain "patent certainty" in the face of what an earlier Federal Circuit decision referred to as a "Damoclean threat with a sheathed sword." *Arrowhead Industrial Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 735 (Fed. Cir. 1988). Sixteen years later, the Federal Circuit changed its mind, ruling that declaratory relief is unavailable unless the sword is out of the scabbard and that Article III mandates that result. This ruling is inconsistent with the Article III jurisprudence of this Court and of other circuit courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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